THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
RACHEL L. CLAY Employee	OEA Matter No. 1602-0045-87R99
v.	Date of Issuance: December 18, 2003
COUNCIL OF THE DISTRICT OF COLUMBIA Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW No. 3

Employee began working for the District government in 1964 as a Clerk-Typist with the Department of Public Welfare. She received several promotions within various agencies of the government and eventually began working for Agency on March 19, 1972 in the Office of the Secretary as an Administrative Aide (Steno). At the time of this appointment, Agency issued to Employee a Form 1 to effect the appointment. A Form 1 is the District government's

personnel form that officially documents a change to an employee's work status. This document stated that the position to which Employee had been appointed was classified as an "Excepted Position."

On February 13, 1975, Agency issued Employee another Form 1.[1] This Form 1 continued to classify Employee's position as "Excepted" and stated in the "Remarks" section that "[a]s a member of the D.C. Council Staff, appointee serves at the will of the appointing authority and this appointment is subject to termination at the pleasure of the Council." Agency issued Employee another Form 1 on May 17, 1976.[2] The "Remarks" section of this Form 1 stated, again, that Employee served at the will of the appointing authority and that the appointment was subject to termination at the pleasure of the Council.

Subsequently, Agency promoted Employee to the position of Legislative Information Aide. The Form 1 documenting this promotion, issued July 4, 1976, classified the position as "Excepted" and, in the "Remarks" section, contained the exact same language found in the Form 1s issued February 13, 1975 and May 17, 1976. Employee received another promotion on June 5, 1977, to the position of Legislative Services Specialist. The Form 1 issued for this appointment classified the position as "Excepted" and contained the same language in the "Remarks" section as that found in the earlier Form 1s.

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[1] It is unclear from the record as to why Agency issued Employee this Form 1.

[2] This particular Form 1 was issued to document Employee's return to duty after having been on a four-month leave without pay absence.

Ultimately, Agency promoted Employee to a supervisory position. This promotion took effect January 29, 1978, and although this position bore the same title as her previous position, Legislative Services Specialist, Employee did not serve in a supervisory capacity until this time. The Form 1 documenting this appointment classified the position as "Excepted" and contained the same language found in the "Remarks" section of the earlier Form 1s.

On April 5, 1984, Agency issued to Employee a Form 1 that documented a change in the title of Employee's position from Legislative Services Specialist to Supervisory Legislative Services Specialist. The document stated that the position was classified as "Excepted" and the "Remarks" section contained the same at-will language as the earlier Form 1s.

Believing that Agency had improperly effected a change to her employment status when it issued the April 5, 1984, Form 1, Employee filed a grievance with Agency. Specifically, Employee thought that on January 1, 1980, her position had been transferred into the Career Service by operation of the Comprehensive Merit Personnel Act (CMPA) and that Agency's attempt to classify her position as "Excepted" pursuant to the April 5, 1984, Form 1 was a wrongful reclassification.[3] Pursuant to Agency's grievance procedures, Agency appointed a hearing examiner to consider Employee's grievance and make a "non-binding recommendation

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[3] January 1, 1980, has been a pivotal date in this appeal. Prior to this date all District government employees were governed by the federal civil service system. On January 1, 1980, the District implemented its own personnel system that was separate and distinct from the federal civil service system. The federal civil service two-category position classification system was replaced by a four-category system: Career Service, Excepted Service, Educational Service, and Executive Service.

to the Chairman regarding disposition of the complaint." On July 3, 1986, the designated hearing examiner found that Employee's position was indeed an Excepted Service position. Nevertheless, in view of Employee's service record with the District government, the hearing examiner recommended that Employee be issued a new Form 1 that would render her position "Career Status–Incumbent Only". On January 9, 1987, the Council's Chairman issued a final decision denying Employee's grievance. Thereafter, on January 27, 1987, Employee filed an appeal with the Office of Employee Appeals (OEA). On December 31, 1990, while her appeal was still pending at OEA, Agency removed Employee from her position. As a result, the Administrative Judge permitted Employee to amend her appeal to include the termination so that both the grievance and the termination could be considered simultaneously.

This appeal has traveled a circuitous path and has had several decisions issued along the way. This Office issued an Initial Decision on July 8, 1992. In that decision, the Administrative Judge found that even though "from March 19, 1972 through December 31, 1979, Employee [had] occupied several 'Excepted positions' under the federal classification system[,]. . .Employee automatically became a member of the Career Service" on January 1, 1980. The Administrative Judge reasoned that pursuant to D.C. Code § 1-602.4(c) (1987), Employee could not have, on January 1, 1980, transferred into the Educational Service, nor could she have transferred into the service created, by this section, for attorneys or for those

employees receiving a special appointment.[4] Thus the Administrative Judge reversed Agency's decision that had placed Employee in the Excepted Service and Agency's action terminating Employee. We upheld this decision in an Opinion and Order issued June 18, 1993.

Agency appealed our decision to the District of Columbia Superior Court and in an Order issued June 22, 1995, that court affirmed our decision. On appeal to the District of Columbia Court of Appeals, the court reversed that decision and remanded the appeal to this Office. The Court of Appeals held in *Council of the District of Columbia v. Clay*, 683 A.2d 1385 (D.C. 1996), that Employee did not become a member of the Career Service on January 1, 1980. The court relied on D.C. Code § 1-602.4(c)and stated that "[b]ecause [this section], by its terms conferred on [Employee] only those protections to which she was entitled prior to January 1, 1980, and because [Employee] did not enjoy, in 1979, the right not to be terminated without cause, it follows that the enactment of [this section] did not invest her with

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[4] D.C. Code § 1-602.4(c)(1987) states in pertinent part as follows:

> On January 1, 1980, all persons employed by the District of Columbia government, including those persons employed by the District of Columbia government on the date that this chapter becomes effective. . .shall automatically transfer into the appropriate personnel system as established pursuant to subchapters VIII [Career Service] and IX [Educational Service] of this chapter or § 1-610.4 [special appointments] or 1-610.9 [attorneys]. The classification of and compensation for the position assumed upon transfer, and the rights and benefits inhering in such position, shall be at least equal to the classification, compensation, rights and benefits associated with the position from which said employee is transferred. The rights and benefits protected under this subsection shall be only those applicable to said employees under the provisions of personnel laws and rules and regulations in force on December 31, 1979: Provided, however, that no employee covered under the provisions of this subsection shall be reduced in pay except as provided. . . .

such a right. . . .[T]he only reasonable import of the entire provision is that the transferred employee receives all of the rights and benefits that he or she enjoyed in the federal service or in the pre-CMPA Career Service, but no additional rights or benefits." *Id.* at 1390.

In an Initial Decision on Remand issued May 12, 1997, the Administrative Judge held that by virtue of the court's decision in *Clay*, Agency's decision that Employee was properly placed in the Excepted Service must be sustained. Further, the Administrative Judge held that Agency's decision to summarily dismiss Employee must also be sustained. Employee appealed that decision to us. In Employee's Petition for Review of that decision, Employee argued, *inter alia*, that Agency committed substantive violations of some rights that Employee presumably enjoyed prior to the enactment of the CMPA, that Agency committed procedural violations in the classification of Employee's position, and that the CMPA and the Home Rule Act (the law which mandated that the District devise its own personnel system) were unconstitutional. On October 10, 1997 we issued an Opinion and Order on Petition for Review No. 2. In this decision we found that the Court of Appeals had considered all of these arguments and had rejected each one by holding that Employee's position was properly classified in the Excepted Service. Thus we saw no need to reconsider these arguments but instead denied Employee's Petition for Review and upheld the Initial Decision on Remand.

Employee again filed an appeal with the Superior Court. In an Order issued November 3, 1998, the court remanded the appeal to this Office with instructions to consider whether Employee should be given Career Service status notwithstanding the statute that properly

placed Employee in the Excepted Service. On September 11, 2000, the Administrative Judge issued an Initial Decision on Remand II. In that decision the Administrative Judge considered three specific arguments posited by Employee: that Employee was similarly situated to other Agency employees who had been given Career Service Status and thus Employee should also have been given Career Service status; that Employee was entitled to Career Service status based on her reasonable reliance on past administrative practices of Agency; and that Employee was entitled to Career Service status based on the principle of "administrative collateral estoppel." With respect to the first two arguments, the Administrative Judge found that Employee was not similarly situated to the other Agency employees who had been given Career Service status and neither did Employee have a reasonable basis for relying upon certain past practices of Agency. As for Employee's third argument, the Administrative Judge found that based on the facts of this case, the collateral estoppel principle was not available to Employee. In that none of these arguments could confer upon Employee the Career Service status she sought, the Administrative Judge once again upheld Agency's action placing Employee in the Excepted Service.

Employee has once again filed a Petition for Review. In this Petition for Review, Employee again argues that she is entitled to Career Service status. Specifically, Employee states that she had certain rights prior to enactment of the CMPA and that Agency could not deprive her of those rights; that Agency committed certain errors in implementing its personnel policies; and that the CMPA and the Home Rule Act are unconstitutional. Employee does not

challenge the Administrative Judge's conclusions regarding the three specific arguments addressed most recently in the Initial Decision on Remand II.

We believe there is no legal nor factual basis for granting Employee's Petition for Review. As we stated in our October 10, 1997, Opinion and Order on Petition for Review No. 2, Employee has already put forth these arguments before the Court of Appeals. That court rejected each one. In fact, Employee has even sought to appeal the Court of Appeals' decision to the United States Supreme Court. The Supreme Court denied Employee's Petition for Certiorari, thereby effectively upholding the Court of Appeals decision. The Court of Appeals decision, which placed Employee in the Excepted Service, has not been overturned. Moreover, our review of the record indicates that Employee has made these arguments countless times before this Office during various stages of this protracted appeal. There is no compelling reason for us to reconsider these arguments. Therefore, we will deny Employee's Petition for Review and uphold the Initial Decision on Remand II.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

RECUSED
Erias A. Hyman, Chair

Horace Kreitzman

Brian Lederer

Keith E. Washington

The initial decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.